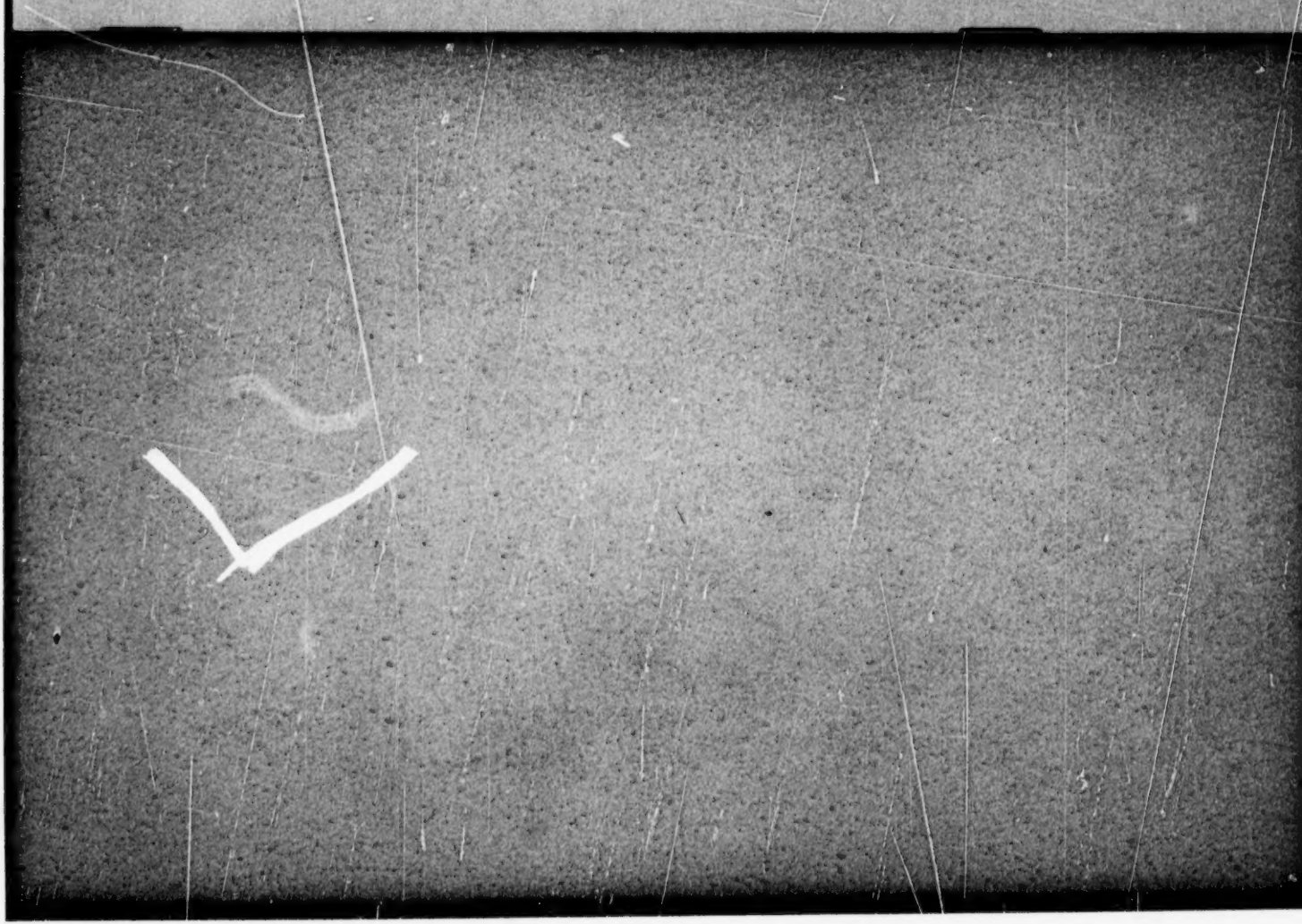

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1709

JOHN H. HENRY, JR.,
Respondent,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
MAKSIS SNEIDERS, *deceased,*
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COUNTERSTATEMENT OF THE CASE

The petition contains so many omissions or misrepresentations that it gives a completely erroneous impression of the facts. An accurate statement of the facts clearly indicates there is no issue to be decided by the court.

Maksis Sneiders and his wife Amalie (petitioner herein) had a stamp dealership in Seattle. Stamps were listed for sale in a different full page advertisement once each month in Linn's Stamp Weekly (a nationally distributed newspaper). An issue of the newspaper in which the many

stamps were listed for sale came to the attention of respondent in New York. Respondent put a pencilled checkmark beside those stamps he wished to purchase and forwarded the marked advertisement, with a check, to petitioner. This was done with respect to several of the advertisements. Respondent paid more than $71,242.68 for stamps before discovering that over 90% of the amount paid was for items not as represented, being either outright forgeries or at least not conforming to representations. Appellant sued each Mr. Sneiders and Mrs. Sneiders, and their marital community, praying for loss of value of the stamps as represented.

Thereafter both defendants were served with a subpoena duces tecum to bring the orders involved (and other records) to their depositions scheduled for June 23, 1970. Defendants moved through present counsel to quash the subpoena, citing only as grounds with respect to orders "conceivably defendants could be required to bring their records of sales to the plaintiff to a deposition, but to bring all of their records of purchases and sales [for the years 1966-70] to a deposition would not only be burdensome and oppressive, but would put defendants out of business." There was no opportunity for hearing on the Motion to Quash the Subpoena prior to the deposition. Without bringing the orders, in that deposition, the defendant Maksis Sneiders, with occasional voluntary assistance from Mrs. Sneiders, all in the presence of petitioner's attorney, testified (much of the time without any objection and with no mention whatsoever of privilege) in substantial detail concerning many aspects of the advertisement forms and marks thereon and some letters which constituted the orders by respondent for stamps. The testimony concerning

the various aspects of the orders and their contents takes up some fifteen or more pages of the fifty-page deposition, with occasional statements that to be fully accurate the information would have to be secured from the orders or records themselves (affirmed to be in the possession or control of petitioner and her husband).

Sometime later, petitioner learned from a customer that postal authorities were seeking information about petitioner's operation. Petitioner again consulted her present counsel. Apparently unaware of the extent of the knowledge of the postal authorities, and believing they could smooth the matter over, petitioner, through her present counsel, agreed to and did deliver to or make available to the postal authorities and the United States Attorney for examination and copying all of the Sneiders' records pertaining to their stamp business in exchange for the privilege of being allowed to appear and testify before the grand jury if the matter should be presented to a grand jury. The records copied included the orders from respondent which petitioner had previously and has subsequently refused to allow respondent to examine by discovery procedures or otherwise.

Both petitioner and her husband thereafter testified extensively before the grand jury upon the advice and accompanied to the courthouse by petitioner's present counsel without any claim of privilege.

Subsequently the grand jury returned an indictment against both petitioner and her husband on twenty-two counts of using the United States mail to defraud some *sixteen* different purchasers of stamps. After the indictment the trial court herein was careful to provide all proper constitutional protections for petitioner and her husband.

In another attempt in the year long effort to examine the orders, in March, 1971 respondent served petitioner with a Request for Production for Inspection under Rule 34 F. R. Civ. P. of the orders sent by respondent to petitioner. A pre-trial hearing on the pending matters was held April 5, 1971. At that hearing petitioner's counsel spent most of the time covered by the fifty-page transcript belaboring this position:

> "MR. EVANS: Your Honor, it's a part of our defense. This is impeachment.
>
> "THE COURT: Well, it's not going to be part of your defense . . . you're not going to try this case by surprise or by ambush. You are going to turn those records over to the plaintiff so he can see the order forms that you put in the advertising . . ."

The court stated that failure to produce the orders would result in an order striking Petitioner's Answer and entry of default. At that time counsel for petitioner advised the court:

> "Well, if they will produce . . . whatever stamps they are going to produce, we will gladly produce the orders, provided they produce here, in the clerk's office, all of the stamps they say they got from us and we will let them look at the orders."

On April 22, 1971, counsel for respondent wrote from Seattle, Washington, to the trial judge in Portland, Oregon, stating:

> "On Friday, April 9, 1971, I served a notice upon Mr. Heckendorn that I would take Mr. Henry's deposition in New York on Monday, April 26, 1971, at 1:00 P.M.
>
> "My professional obligation to my client requires that I take Mr. Henry's testimony before he sees the orders he sent and the letters he wrote."

The court acceded to this request by written Minute Entry as follows:

> "Judge Goodwin stated that it had been his intent on April 5, 1971, that a default judgment would be entered against defendant unless the purchase orders were turned over to Mr. Heckendorn by Mr. Evans on or before April 15, 1971.
>
> • • •
>
> "Judge Goodwin further noted Mr. Evans' desire to ask some questions of Mr. Henry at a deposition on April 26, 1971, before turning the purchase orders over to Mr. Heckendorn. Accordingly, Judge Goodwin ordered . . . that Mr. Evans may, on April 26, 1971, ask such questions of Mr. Henry as he wishes asked before the purchase orders are turned over. After these questions have been asked, answers given, and all objections to the questions and answers noted, Mr. Evans shall forthwith, then and there, turn over the purchase orders, and the deposition shall proceed."

Although copies of the foregoing minute entry and court order were in possession of petitioner's attorney at the deposition of respondent in New York City on April 26, 1971, petitioner's attorney contemptuously refused on several occasions to obey the clear order of the court, all as clearly recorded in the transcript of the deposition.

Respondent's husband, Maksis Sneiders, died on May 24, 1971. On June 16, 1971, the United States Attorney presented and there was entered an Order dismissing the criminal indictments against petitioner and her husband. Petitioner, as executrix of her husband's estate, was substituted as a party defendant in this civil suit.

Respondent duly brought on for hearing on July 9, 1971, all pending motions, discovery proceedings, and pretrial issues, and a motion for an order finding defendant and her counsel in contempt of court, striking the plead-

ings of the defendants, finding defendants in default, and granting judgment to the plaintiff for willful failure by the defendants and their counsel to comply with Orders of the court, and for willful and intentional obstruction of the procedures of the court and justice.

At the hearing July 9, 1971, the following exchange took place:

> "THE COURT: What is this hide-and-seek game going on? Why can't the plaintiff see those [orders]?
>
> "MR. EVANS [counsel for Petitioner]: As a matter of rebuttal, Your Honor, it's a matter of impeachment . . ."

And later:

> "The only thing that I've got left is impeachment, and I don't think the Court should deprive me of the only weapon I have left."

At the conclusion of the hearing on July 9, 1971, the court orally in open court and by proper written Order stated that after mature and careful consideration the court could find no justification for the willful failure to comply with the court's Orders of April 5 and April 22, 1971, or for refusal of petitioner and her counsel to deliver for examination and copying all orders of respondent to petitioner for stamps, and the court ordered such delivery by August 9, 1971, or, if not so delivered, that the court would on that date enter respondent's Motion for Default and find petitioner and her counsel in contempt of court.

At a hearing on August 9, 1971, the orders had not been delivered, petitioner's counsel again refused to do so, but, in response to respondent's request for the Order of Default, petitioner's counsel advised the court that petitioner had petitioned the Ninth Circuit Court of Appeals for an

Order to remove the trial judge from the case, and asked for a delay pending hearing on that petition. Bending way over backwards, the trial court orally and by written Order, delayed until five days after receipt of Order on the Petition from the Ninth Circuit entry of the Order of Default of Petitioner. The Ninth Circuit fairly promptly denied the petition (which had been very inaccurate and contemptuous). During the five days thereafter, on September 15, 1971, counsel for petitioner prepared an Affidavit for petitioner *for the first time* to personally claim that showing records to respondent on discovery might tend to incriminate petitioner, and petitioned the trial court to reconsider granting default. The trial court again carefully considered all questions involved and on October 12, entered an Order denying respondent's Petition to Reconsider the oral Order for Default, and a week later, on August 19, 1971, entered the Order of Default presented August 9, 1971, which Order authorized respondent to present evidence on the issue of respondent's actual damages.

The trial on damages was postponed at petitioner's request and petitioner, on January 6, 1972, was again given an opportunity to comply with the previous Order of the court to allow examination of the purchase orders involved, but did not do so.

On January 21, 1972, respondent's Memorandum Supporting Judgment substantially in excess of the amount ultimately granted was provided counsel for the petitioner. Petitioner and her counsel participated in the trial on February 4, 1972, where the evidence fully supported the damages granted. Thereafter, respondent moved for a new trial. Briefs were submitted, new trial was denied, and judgment

was finally entered on February 21, 1972. There was an appeal to the Ninth Circuit. The panel unanimously affirmed. The Petition for Rehearing en banc was unanimously denied.

CERTIORARI SHOULD BE DENIED

The facts show that the Circuit Court decision was fair and correct.

The trial court Order to deliver only orders for examination and copying was very narrow. It covered only advertisements published by petitioner in a national newspaper upon which respondent had made some check marks indicating the stamps respondent wanted, plus some letter orders from respondent. Since petitioner did not make the marks on the advertisements or letters, petitioner could not be held responsible for the markings. Petitioner delivered the orders to the investigating authorities for copying, upon advice of counsel, so any link in any chain of incriminating evidence was already voluntarily supplied. Only the orders were directed to be produced and those for examination only. No ruling was made or requested on their admissibility into evidence. No statement was ever made as to how the orders in any way could be incriminating. Only the right to surprise respondent was ever stated in support of claim of privilege.

The testimony by Mr. Sneiders, assisted by Mrs. Sneiders, at his initial deposition in this matter, covering some fifteen pages about the orders, constituted a waiver of any privilege against incrimination, if any had existed with respect to the orders.

> "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from

the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her. Disclosure of a fact waives the privilege as to details. As this Court stated in *Brown v. Walker,* 161 US 591, 597 (1896):

> " 'Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure.'
>
> "Following this rule, federal courts have uniformly held that where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details." *Rogers v. United States,* 340 U.S. 367, 372-373 (1950).

The assertion of privilege made some one and one-half years after Mr. Sneiders' testimony concerning the orders and their contents, after repeated statements in open court that petitioner's refusal to produce was for the purpose of preserving petitioner's right to surprise respondent, and after delivery of the material to law enforcement authorities, amply demonstrate *lack of good faith* by petitioner. The claim of privilege coming when it did constitutes only a grasp for a straw to support a continuing obstinate refusal to comply with long established fundamental discovery procedures. The only information available about any danger of incrimination comes from self-serving statements by petitioner or her counsel, many of which have since been refuted by petitioner. Likewise, delivery of the various orders and records to the prosecuting authorities has never been indicated as plea bargaining except in the petition herein.

When counsel for petitioner did, after one and one-half years, file an affidavit claiming privilege on behalf of

petitioner, the documents weret then held by petitioner in petitioner's representative capacity as executor of the estate of Maksis Sneiders, deceased.

> "Books and records kept 'in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.'" *United States v. White* (1944), 322 U.S. 694; *Rogers v. United States,* 340 U.S. 367.

It is well settled that a witness is not exonerated from answering a question merely because the witness declares that in so doing he would incriminate himself. *Mason v. United States,* (1917) 244 U.S. 362; *Hoffman v. United States,* (1951) 341 U.S. 479.

It is for the trial court to decide whether even a genuine fear by a witness of incrimination is well founded. *Rogers v. United States, supra reh. den.,* 341 U.S. 912.

The court will require a witness to answer if it clearly appears to the court that the witnesses' refusal to answer on the ground of claimed privilege is mistaken. The trial court is in a better position to appreciate the essential facts than an appellate court can do and the trial court must be permitted to exercise some discretion and common sense. *Mason v. United States, supra.*

The trial court took into consideration all circumstances of the case, including previous disclosures. The trial judge "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *Hoffman v. United States, supra.*

The facts utterly disposed of a claimed conflict with decisions of other circuits. The 9th Circuit Court of Appeals

correctly held that where the orders were already produced in the *criminal* action, their disclosure in the *civil* action could not increase or affect petitioner's *criminal* liability. This is not inconsistent with the authorities cited by petitioner, each of which was a criminal case or grand jury investigation of crime or criminal activity, where no prior disclosure had been made *in that case.*

The contumacious behavior of petitioner and her counsel resulted in liability by default. It did not affect the damages, nor respondent's burden of proof as to amount of damages. Petitioner participated in the trial on damages. There was absolutely no penalty. The damages were well within the scope of the pleadings and the evidence.

The instant case bears no relationship whatsoever to the petition in Cause No. 73-689, *Michael Anthony Maness, Petitioner, v. The Honorable James R. Meyers, Respondent.* The cases are clearly distinguishable on their facts.

Maness involves criminal contempt of an attorney who advised his client not to produce, in response to the prosecutor's subpoena duces tecum, allegedly pornographic material at a criminal trial. *Possession* of the subpoenaed material could lead to conviction, although the particular proceeding was principally for the purpose of enjoining the sale of the allegedly pornographic material. The municipal government in that case had not established the client's *possession* of pornography. The material was displayed for sale to the public. Presumably the prosecution contends this is a waiver of any claimed privilege as to the question of possession.

In the case at bar, the material, whether incriminating or not, is already in the hands of the prosecuting authorities. Here there is no question presented of an attorney being punished for advice given to his client. And more particularly, *Maness* deals with a proceeding brought under criminal statutes, while the instant case is wholly civil in nature. Petitioner was in no fashion "compelled in any criminal case to be a witness against herself."

Possession is not at issue in the instant case. Nor has petitioner ever claimed that the contents of the ads themselves were potentially incriminating. To the contrary, the Affidavit of Petitioner, set out at length in Petition as Appendix E, pages A-13 to A-16, discloses that the real purpose of non-disclosure was surprise, as shown previously.

SUMMARY

The purchase orders ordered to be produced were not privileged. The claim of privilege was not made in good faith. Even if the orders had been privileged, the privilege had been voluntarily waived by petitioner and by the estate petitioner represented by prior delivery of the requested orders to law enforcement authorities. Those who violate criminal laws (or who assert that they may be guilty of crime) should not be granted special advantages in civil suits over law abiding citizens. The decision of the trial and appellate courts was in accord with the decisions of this court and the circuit courts and was correct and fair.

The Honorable Trial Judge summed the matter up in his statement on this issue:

> "What I did feel and still do feel is that it's about as classic of an example as one could find of just obstinate refusal to cooperate with the discovery rules, the purpose of which are to prepare a case for trial."

The petition for certiorari should be denied.

Respectfully submitted,

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